

No. 12-2242 HA

On October 22, 2013, the Board dismissed 15 of the 16 counts in its complaint. On November 19, 2013, we held a hearing on the remaining count in the complaint, which alleged that Knight was subject to discipline because Des Peres Hospital (“the Hospital” or “Des Peres”) had revoked Knight’s medical staff privileges and membership for reasons related to quality of

care and professional conduct. Nancy Leah Skinner and Rene Ugarte, with Glenn E. Bradford & Associates, P.C., represented the Board. Thomas W. Rynard, with Blitz, Bardgett & Deutsch, L.C., represented Knight. We set a timeline for the parties to file written arguments.

On April 2, 2014, the day his written argument was filed, Knight also filed a motion to reopen the evidence. The basis for his motion was a settlement agreement he had entered into with the Hospital on March 24, 2014 (“the Agreement”). The Board objected to Knight’s motion, but we granted the motion and held a telephone conference with the parties. During the telephone conference, the Board requested leave to file an amended complaint. We granted the Board’s motion, entered a scheduling order for filing amended pleadings, and set a hearing date of July 9, 2014.

On May 27, 2014, the Board filed an amended complaint, and on June 4, 2014, Knight filed an answer to the amended complaint. On July 9, 2014, we held a second hearing for the limited purpose of hearing evidence relating to the Agreement.<sup>1</sup> The matter became ready for our decision on October 17, 2014, the date the last written argument was received.

Commissioner Karen A. Winn, having read the full record including all the evidence, renders the decision. Section 536.080.2, RSMo 2000;<sup>2</sup> *Angelos v. State Bd. of Regis’n for the Healing Arts*, 90 S.W.3d 189 (Mo. App., S.D. 2002).

### **Findings of Fact**

1. Knight is licensed by the Board as a medical physician and surgeon. His certificate of registration is current, and was current and active at all relevant times.
2. Knight generally practices in the area of vascular surgery and his registered practice address is 7601 Natural Bridge, Suite 101, St. Louis, Missouri.

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<sup>1</sup> Commissioner Alana Barragan-Scott presided over the first hearing, and Commissioner Karen A. Winn presided over the second hearing.

<sup>2</sup> Statutory references, unless otherwise noted, are to the 2013 Supplement to the Revised Statutes of Missouri.

3. In April of 2010, Knight was recruited by the Hospital to move the Wound Care Center (“the Center”) to the Hospital after it was announced that Forest Park Hospital (where the Center had been located) was closing. The Center opened at the Hospital, and 90-95% of Knight’s practice at the Hospital originated from the Center.

4. Before the Center opened at the Hospital, Knight’s association with the Hospital had been minimal. He only saw emergency patients there.

5. In the spring of 2011, the Hospital convened several meetings of an ad hoc committee to discuss concerns about Knight’s practice there. By courier service, it sent Knight several letters discussing these concerns and meetings.

6. An April 6, 2011 letter from John Dubois, D.O., the Hospital’s chief of staff, discussed the concerns with some particularity and asked for information from Knight. It further stated that the ad hoc committee formed to review these concerns would meet on April 27 and that Knight could appear before the committee to discuss the issues.

7. A May 27, 2011 letter from Tom Casaday, the Hospital’s interim chief executive officer, stated that the ad hoc committee had met on April 27 and voted to recommend to the executive committee that Knight’s privileges at the Hospital be revoked, and that the executive committee had accepted the recommendation. The letter, with a subject line of “Special Notice of Advance Action and Right to Hearing,” also set forth Knight’s appeal rights, which included the right to request a hearing by filing a written request with Casaday within thirty days of Knight’s receipt of the special notice.

8. Knight contends he received neither of the above letters.

9. On June 30, 2011, Casaday sent a letter to Knight notifying him that the Hospital’s board of directors had voted to revoke his medical staff membership and privileges at the

Hospital (“the revocation”). The revocation letter informed Knight that the action had been taken after the ad hoc committee’s investigation of claims of nine “confirmed retained foreign objects” and two questionable cases of retained foreign objects, various quality of care concerns, and Knight’s failure to timely inform the Hospital regarding a Board investigation and action relating to his license. The letter also informed Knight that the board of directors’ decision was immediately effective.

10. Thereafter, Knight attempted to appeal the revocation, but was informed that his appeal was untimely. He disputed the validity of the revocation on the grounds that the Hospital did not follow its by-laws during the revocation process.

11. The Hospital filed a report of its action with the National Practitioner Data Bank.

12. At the time of the revocation, Knight was practicing at two other hospitals. Most of the patients he saw preferred to be treated at the other hospitals because they were closer to his office. Knight knew that the Hospital had closed the Center, and he did not intend to renew his privileges at the Hospital.

13. Subsequently, Knight’s privileges at the Hospital expired by operation of the Hospital’s by-laws, on February 28, 2012.

14. After the hearing in this case, Knight entered into settlement negotiations with the Hospital regarding the June 2011 revocation of his privileges.

15. As a result of those negotiations, on or about March 24, 2014, Knight and the Hospital entered into the Agreement to “avoid the time, expense and uncertainty of litigation.” Resp. Ex. F.

16. The Agreement states:

1. Des Peres hereby rescinds its action of June 28, 2011 revoking the medical staff membership and privileges of Knight effective as of June 30, 2011.

2. Dr. Knight has not practiced at Des Peres Hospital since June 11, 2011, has not sought and will not seek reinstatement of his medical staff membership and privileges which expired by operation of the medical staff by-laws as of February 28, 2012.

3. Within 10 days of the execution of this Agreement, Des Peres shall file a Revision to Action report with the National Practitioner Data Bank which will state that following the filing of the original report, Knight challenged Des Peres' action alleging that he did not receive notice of the adverse action. The report will further state that because Knight has not practiced at Des Peres Hospital since June 11, 2011 and has not and will not seek reinstatement of his expired privileges, and in order to avoid the cost and expense of litigation, Des Peres has rescinded its action of June 11, 2011 revoking Knight's privileges.

*Id.*

17. The Agreement also states:

4. Knight does hereby release and forever discharge Des Peres, its officers, directors, agents, servants, employees, its medical staff members and all individuals who in any way participated in any action which gave rise to or resulted in the revocation of his medical staff membership and privileges at Des Peres (the "Released Parties") from any and all actions and causes of action, whether at law or in equity, losses, damages, costs, expenses, liabilities, obligations and claims or demands of any kind, that Knight may have . . . . Knight understands that by executing this Agreement, he is giving up all rights and he is granting a final and complete release to the Released Parties. . . .

*Id.*

18. Knight did not attempt to renew his privileges at Des Peres Hospital after they expired on February 28, 2012.

### **Conclusions of Law**

We have jurisdiction over this matter. Sections 334.100.2 and 621.045. The Board has the burden to prove, by a preponderance of the evidence, that Knight is subject to discipline. *See Kerwin v. Mo. Dental Bd.*, 375 S.W.3d 219, 229-30 (Mo. App., W.D. 2012) (dental licensing board demonstrates "cause" to discipline by showing preponderance of evidence). A

preponderance of the evidence is evidence showing, as a whole, that “the fact to be proved [is] more probable than not.” *Id.* at 230, quoting *State Bd. of Nursing v. Berry*, 32 S.W.3d 638, 642 (Mo.App. W.D., 2000). When evidence conflicts, we must assess the credibility of witnesses, and we have the discretion to believe all, part, or none of a witness’ testimony. *Dorman v. State Bd. of Registration for the Healing Arts*, 62 S.W.3d 446, 455 (Mo. App., W.D., 2001).

### I. Constitutional Issues

In his answer to the amended complaint, Knight argues that § 334.100.2(4)(g) is unconstitutional. This Commission does not have authority to decide constitutional issues. *Sprint Communications Co., L.P. v. Director of Revenue*, 64 S.W.3d 832, 834 (Mo. banc 2002); *Cocktail Fortune, Inc. v. Supervisor of Liquor Control*, 994 S.W.2d 955, 957 (Mo. banc 1999). The issue has been raised and may be argued before the courts if necessary. *Tadrus v. Missouri Bd. of Pharmacy*, 849 S.W.2d 222 (Mo. App., W.D. 1993).

### II. Objections Taken With the Case

We took the following objections with the case.

#### A. Testimony of John Joseph Dubois

##### 1. Knight’s Objections

Dubois was the chief of staff at the Hospital and was involved with both the ad hoc committee and the medical executive committee process concerning Knight’s revocation. Dubois testified as to the reasons the Hospital’s medical executive committee decided to take the disciplinary action against Knight. Knight objected to Dubois’ testimony both in writing and at the first hearing. Respondent’s Objection to Affidavit & Testimony of John Dubois;<sup>3</sup> First Hearing Tr. at 35-36.

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<sup>3</sup> Filed on November 18, 2013.

Knight argues that Dubois' testimony is inadmissible under § 537.035 ("the peer review statute"), which states:

4. Except as otherwise provided in this section, the interviews, memoranda, proceedings, findings, deliberations, reports, and minutes of peer review committees, or the existence of the same, **concerning the health care provided any patient** are privileged and shall not be subject to discovery, subpoena, or other means of legal compulsion for their release to any person or entity **or be admissible into evidence in any judicial or administrative action for failure to provide appropriate care.** Except as otherwise provided in this section, no person who was in attendance at any peer review committee proceeding shall be permitted or required to disclose any information acquired in connection with or in the course of such proceeding, or to disclose any opinion, recommendation, or evaluation of the committee or board, or any member thereof; provided, however, that information otherwise discoverable or admissible from original sources is not to be construed as immune from discovery or use in any proceeding merely because it was presented during proceedings before a peer review committee nor is a member, employee, or agent of such committee, or other person appearing before it, to be prevented from testifying as to matters within his personal knowledge and in accordance with the other provisions of this section, but such witness cannot be questioned about testimony or other proceedings before any health care review committee or board or about opinions formed as a result of such committee hearings. The disclosure of any interview, memoranda, proceedings, findings, deliberations, reports, or minutes to any person or entity, including but not limited to governmental agencies, professional accrediting agencies, or other health care providers, whether proper or improper, shall not waive or have any effect upon its confidentiality, nondiscoverability, or nonadmissibility.

(Emphasis added). A peer review committee is "a committee of health care professionals with the responsibility to evaluate, maintain, or monitor the quality and utilization of health care services or to exercise any combination of such responsibilities." Section 537.035.1(2). Knight contends, and the Board does not disagree, that the ad hoc committee and the medical executive committee were peer review committees.

The Board argues that testimony about the reasons for a hospital's disciplinary action is not protected under this statute. It points out that the peer review statute does not give total immunity from discovery or admissibility. *State ex. rel. Dixon v. Darnold*, 939 S.W.2d 66, 70-71 (Mo. App., S.D. 1997). Knight, as the party asserting the privilege, bears the burden to prove the privilege applies. *Id.* at 70. In *State ex rel. Faith Hospital v. Enright*, 706 S.W.2d 852 (Mo. banc. 1986), the court noted that not all functions of a peer review committee are exempt from discovery. In order to be protected, the findings must specifically concern the health care provided any patient. *Id.* at 855-56. In *State ex rel. Kirksville Missouri Hospital Co., LLC v. Jaynes*, 328 S.W.3d 418 (Mo. App., W.D. 2010), the court found that minutes from a peer committee meeting that did not concern health care provided to a patient were not exempt from discovery. *Id.* at 428.

Dubois testified:

Q: So you have personal knowledge of the events that occurred leading up to the revocation of [Knight's] privileges?

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A: Okay. From what I recall, the primary concern was the retained foreign objects and his failure to document that in his records, as well as disclose that to the patient was the primary reason that his privileges were revoked.

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A: As I recall, there were also concerns regarding his disclosure of an ongoing case with the Board of Healing Arts, as well as failure to be properly credentialed by the hospital for the procedures that he was performing.

First Hearing Tr. at 36-37.

Evidence about the cause of the revocation is relevant because, in order for there to be cause for discipline under § 334.100.2(4)(g), the Hospital's disciplinary action must be "related

to unprofessional conduct, professional incompetence, malpractice or any other violation of any provision of this chapter[.]” If the peer review statute operated as Knight argues to bar any evidence of the reason for a hospital’s disciplinary action, cause for discipline under § 334.100.2(4)(g) would be very difficult to establish.

Dubois did not testify about any particular patient’s care. He testified as to why the Hospital took the action that it did. In addition, § 537.035.4 bars the admissibility of evidence concerning the health care provided any patient in a *judicial or administrative proceeding for failure to provide appropriate care*. The subject of this case is the revocation of King’s privileges by the Hospital, not his failure to provide appropriate care – although we acknowledge the former is based in part upon the latter. And even if we were to adopt Knight’s interpretation of the peer review statute, it would not bar all of Dubois’ testimony. Dubois testified that one reason for the revocation of Knight’s privileges was his failure to inform the Hospital of an investigation by the Board. Such testimony does not concern “the health care provided any patient.”

Although we have not found a case in Missouri that addresses this issue directly, cases in other states interpreting their own peer review statutes have found that the privilege from discovery afforded to a hospital peer-review committee did not include discovery from a defendant physician concerning the termination, suspension, or restriction of that physician’s hospital privileges. *Anderson v. Breda*, 700 P.2d 737, 742 (Wash. Sup., 1985). The Supreme Court of Rhode Island made a similar finding in a discovery dispute that occurred in the context of a malpractice action: “Making the fact of loss or restriction of privileges unavailable to the injured party is not necessary to accomplish the purposes of the peer-review statute and therefore should not be privileged.” *Moretti v. Lowe*, 592 A.2d 855, 858 (R.I. Sup., 1991). That court noted the public policy behind Rhode Island’s peer review statute:

In enacting our peer-review statute, the Legislature recognized the need for open discussions and candid self-analysis in peer-review meetings to ensure that medical care of high quality will be available to the public. That public purpose is not served, however, if the privilege created in the peer-review statute is applied beyond what was intended and what is necessary to accomplish the public purpose. The privilege must not be permitted to become a shield behind which a physician's incompetence, impairment, or institutional malfeasance resulting in medical malpractice can be hidden[.]

*Id.* at 857-58.

Knight also argues that Dubois' testimony is inadmissible hearsay and inadmissible opinion evidence. We find that it is neither. Dubois testified that he had personal knowledge of the events leading up to Knight's revocation. First Hearing Tr. at 36. He was a non-voting member of the Board of Directors, and attended meetings during which Knight was discussed. He could testify as a fact witness as to the rationale behind the decision to revoke Knight's privileges at the Hospital.

All of these observations aside, although we admit Dubois' testimony – and we agree that whether to do so is a close question– we do not rely on it. First, we note that much of it concerned the disciplinary procedures followed by the Hospital, which, as we discuss below, we find irrelevant. Second, his testimony is not definitive, in that he prefaced his answers to questions regarding the reasons for the revocation with “From what I recall” and “As I recall.” Finally, we note that even without Dubois' testimony, other evidence in the record to which Knight did not object – particularly the Board's Exhibits 1, 2, and 8<sup>4</sup> – discusses the reasons for

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<sup>4</sup> It could be argued, despite Knight's failure to object to them, that these exhibits are also inadmissible under § 537.035.4. All of them are labeled ‘CONFIDENTIAL PEER REVIEW PRIVILEGED COMMUNICATION.’ For our findings as to the cause of Knight's revocation, we have relied on Exhibit 8, the revocation letter. Although it bears the same confidentiality designation, it is the final decision of the Hospital's board of directors, not one of the peer review committees. We find that, even under a broad interpretation of § 537.035.4, it is admissible.

the revocation. Dubois' testimony on this point is additional foundation, but is not necessary to our findings of fact.

We overrule the objection, but we do not rely on Dubois' testimony.

## 2. The Board's Objection

The Board objected to Dubois' testimony on cross-examination about the Hospital's process and procedures regarding the revocation. First Hearing Tr. at 46-47. The Board argues this testimony is irrelevant. We agree. While we must consider the reason for the Hospital's action, the Hospital's procedures are not part of our review.

Knight argues that because the Hospital did not follow a regulation and its own bylaws in its disciplinary process, it is as if the revocation never occurred. In other words, he argues that the revocation is void *ab initio* and, therefore, cannot be cause for discipline. Knight cites no law to support this contention, and we have rejected similar arguments in the past. We have no authority to superintend the Hospital's practices or its implementation of its own disciplinary procedure. *Missouri Health Facilities Review Comm. v. Administrative Hearing Comm'n*, 700 S.W.2d 445, 450 (Mo. banc 1985). Similarly, there is no indication in Chapter 334 that this Commission is authorized to consider the sufficiency of those procedures in determining whether a physician is subject to discipline under § 334.100.2(4)(g).

In *Egan v. St. Anthony's Med. Ctr.*, 244 S.W.3d 169, 174 (Mo. banc 2008), the court found that a medical staff member "may bring an action in equity for injunctive relief to compel the hospital to substantially comply with its own bylaws before his privileges may be revoked." Knight asserts that *Egan* also requires an examination of the procedures before finding cause for discipline, but the case does not give us that authority. The *Egan* court clearly stated that such an action would be brought in equity. As an administrative agency, we have no authority to apply the doctrines of equity. *Soars v. Soars-Lovelace, Inc.*, 142 S.W.2d 866, 871 (Mo. 1940). Thus,

the proper forum to attack the Hospital's procedures, including whether Knight received proper notice, would have been circuit court.

We sustain the Board's objection.

### B. Exhibits 14, 15, and H

Knight objected to Exhibits 14 and 15. Second Hearing Tr. at 16. Exhibit 14 is the National Practitioners' Data Bank Report from the Hospital reporting the Revocation and the basis for the action taken. Exhibit 15 is an affidavit of Melinda Ihlenfeldt, the person who made the report.

The Board objected to Exhibit H, an e-mail from Knight's attorney, Steven Hamburg, asking that the report be modified to reflect the exact language of the Agreement. Second Hearing Tr. at 32-33.

While we find the exhibits of little importance in this case, we admit Exhibits 14 and 15 as evidence that a report was filed. We admit Exhibit H as evidence that the language reported was slightly different from that in the Agreement.

### III. Cause for Discipline

The basic facts in this case are not in dispute. The Hospital revoked Knight's privileges for failure to timely inform it of a Board investigation, unspecified "quality of care" concerns, and multiple cases of retained foreign objects. Subsequently, Knight and the Hospital entered into an Agreement in which the Hospital "rescinded" its revocation. The issue in this case is whether, under these circumstances, Knight is subject to discipline under § 334.100,<sup>5</sup> which states:

2. The Board may cause a complaint to be filed with the administrative hearing commission as provided by chapter 621 against any holder of any certificate or registration or authority,

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<sup>5</sup> Because the relevant portions of this statute have not changed significantly, we cite to the current version.

permit or license required by this chapter or any person who has failed to renew or has surrendered his certificate of registration or authority, permit or license for any one or any combination of the following causes:

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(4) Misconduct, fraud, misrepresentation, dishonesty, unethical conduct, or unprofessional conduct in the performance of the functions or duties of any profession licensed or regulated by this chapter, including, but not limited to, the following:

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(g) Final disciplinary action by any professional medical or osteopathic association or society or licensed hospital or medical staff of such hospital in this or any other state or territory, whether agreed to voluntarily or not, and including, but not limited to, any removal, suspension, limitation, or restriction of the person's license or staff or hospital privileges, failure to renew such privileges or license for cause, or other final disciplinary action, if the action was in any way related to unprofessional conduct, professional incompetence, malpractice or any other violation of any provision of this chapter[.]

We conclude Knight is subject to discipline because both the 2011 revocation and the 2014 Agreement were final disciplinary actions related to professional incompetence, repeated negligence, and conduct that is or might be harmful to the mental or physical health of a patient.

#### A. The 2011 Revocation

##### 1. The Revocation was a Final Action

We find that the Hospital's revocation of Knight's staff membership and privileges was a final action.

"Final" means "Last; conclusive; decisive; definitive; terminated; completed."

BLACK'S LAW DICTIONARY 629 (6<sup>th</sup> ed. 1990). The concept of finality is discussed in the context of administrative and court decisions. To be ripe for appeal, administrative decisions

must meet the same standard as a court decision. *Citizens Electric Corp. v. Campbell*, 696 S.W.2d 844 (Mo. App., W.D. 1985). The court in *Fowler v. T.J. Ahrens Excavating, Inc.*, 431 S.W.3d 561 (Mo. App., E.D. 2014), stated:

A decision is final for appeal purposes when “the agency arrives at a terminal, complete resolution of the case before it. An order lacks finality in this sense while it remains tentative, provisional, or contingent, subject to recall, revision or reconsideration by the issuing agency.”

*Id.* at 562 (citations omitted). Courts also consider the language used in the “decision” to determine whether it should be considered final. In *Fleming v. City of Jennings*, 133 S.W.3d 148 (Mo. App., E.D. 2004), the court found that a letter from the City to landowners was not a final order because the letter contained words and phrases such “could declare,” “take appropriate steps,” “continue with the condemnation,” and “continue to monitor the progress,” which the court found to be tentative and not indicative that the City had reached a final decision. *Id.* at 150.

In contrast to *Fleming*, the Hospital used very definitive language in its letter informing Knight of the revocation:

The purpose of this letter is to advise you that the Board of Director [sic] accepted the Medical Executive Committee’s recommendation and voted to revoke your medical staff membership and privileges. **This decision was immediately effective.** Notice that you are no longer on the Medical Staff will be communicated to staff today, June 30, 2011.

Pet. ex. 8 (emphasis added). There is little doubt that the Hospital’s Chief Executive Officer intended to finally revoke Knight’s privileges and intended this letter to convey this decision to Knight. The Hospital made a final decision and thus took a final action against Knight. The fact that the Hospital later rescinded the revocation does not mean the action was not final – just as

the fact that a judgment might be reversed or vacated on appeal does not mean it was not a final judgment.

## 2. The Revocation was a Disciplinary Action

A revocation is clearly a disciplinary action under § 334.100.2(4)(g). Knight argues that the revocation was void and cannot form the basis for discipline of his license for two reasons.

### i. Procedural Irregularity

Knight argues that because the Hospital did not afford him due process under its bylaws before it revoked his privileges, the revocation is invalid and there is no cause for discipline under § 334.100.2(4)(g). As noted above, we do not have that authority to pass judgment on the Hospital's disciplinary process. Nor is there any indication that we must do so. It is enough that we find that the revocation occurred; it was final; and it was related to unprofessional conduct, professional incompetence, malpractice, or any other violation of Chapter 334.

Because we lack authority to determine whether there are any irregularities in the Hospital's procedures, we cannot find the revocation to be void on that basis.

### ii. Impact of the Rescission on the Revocation

Knight also argues that because the Agreement rescinded the revocation, the revocation was void and cannot serve as cause for discipline. The Agreement clearly states that Des Peres rescinds its action revoking Knight's medical staff membership and privileges. "Rescind" is defined as follows:

**1** : to do away with : take away **2a** : to take back : ANNUL, CANCEL . . . **b** : to abrogate (a contract) by tendering back or restoring to the opposite party what one has received from him (as in cases of fraud, duress, mistake, or minority) **3** : to vacate or make void (as an act) by the enacting or a superior authority : REPEAL[.]

WEBSTER’S THIRD NEW INTERNATIONAL DICTIONARY 1930 (unabr. 1986). The definition in Black’s Law Dictionary is “To abrogate, annul, avoid or cancel (a contract) unilaterally or by agreement . . . To make void; to repeal or annul <rescind the legislation.” BLACK’S LAW DICTIONARY 1420 (9th ed. 2011). Knight cites two cases to support his position.

In *Hummel v. Board of Chiropractic Examiners of Colorado*, 87 P.2d 248 (Colo. 1939), the Court found that when a conviction that was the basis for license discipline was reversed, the license discipline could not stand. The Court stated that nullification of the criminal convictions in the county court “had restored to [Hummel] the constitutional right to a presumption of innocence.” *Id.* at 250. The Court did not, however, say that the criminal convictions had never existed. The Court merely took issue with the Chiropractic Board “function[ing] as a substitute tribunal” to the criminal court after the nullification. *Id.*

In *Webb v. State Medical Bd. of Ohio*, 767 N.E.2d 782 (Ohio Ct. App. 2001), the West Virginia Board of Medicine revoked Webb’s license and a West Virginia court reversed and vacated this decision. The *Webb* Court found that the West Virginia discipline would not support discipline in Ohio as discipline taken by another state. The Court stated:

“[I]t would be a substantial miscarriage of justice” for the Ohio medical board to deny a physician’s licensure based upon allegations that were ultimately cleared in another jurisdiction.

*Id.* at 788 (quoting *In re Wolfe*, 612 N.E.2d 1307 (Ohio Ct. App. 1992)). This case is also distinguishable because Knight has not been cleared of anything. The Agreement does not in any way address the reason for the revocation – that Knight failed to provide an acceptable level of care, including several cases of retained foreign objects, and failure to inform the Hospital of an investigation.

Instead, we believe the case before us is analogous to other cases in which rescission did not negate the existence of the underlying action. In *State v. Stone*, 764 N.W.2d 545 (Iowa 2009), Stone was convicted of the criminal offense of refusing an operating-while-intoxicated test. The Iowa Department of Transportation (“DOT”) revoked Stone’s driver’s license, and later rescinded the revocation. Between the time of the license revocation and the rescission of that revocation, Stone was convicted of the criminal offense of driving while his license was denied or revoked. Stone argued that because the revocation of his license had been rescinded, the State should not have been able to prosecute him for driving without a license. The Court phrased Stone’s argument as follows:

Stone claims the State could not charge him under section 321J.21 because the DOT rescinded his license revocation. He argues that when the DOT rescinds a revocation, the rescission applies retroactively. In other words, a rescission of a revocation means the revocation never existed.

*Id.* at 549.

After considering the definitions of “rescind,” the court rejected this argument, stating:

Rescission, as used in the contractual sense, is an equitable remedy devised by the law. See *Potter v. Oster*, 426 N.W.2d 148, 151 (Iowa 1988) (stating “[r]escission is a restitutionary remedy which attempts to restore the parties to their positions at the time the contract was executed.”) The remedy of rescission does not assume the events occurring prior to the remedy did not occur. *Barlow v. Comm’r of Pub. Safety*, 365 N.W.2d 232, 233 (Minn. 1985).

*Id.* at 549-50. The Court found that, when Stone was driving, he did not have a license because it had been revoked. The rescission of that revocation did not change this fact, and the State could prosecute him for that crime.

In *People v. Elliot*, 4 N.E.3d 23 (Ill. 2014), a case with the same fact pattern, the Court reached the same conclusion. The Court noted that “rescind” could have both prospective and retroactive meanings and found that the rescission did not retroactively apply to make the fact

that Elliot drove without a license disappear. *Id.* at 25-28. One of the Court’s many reasons for this decision was the public policy of prosecuting unlicensed drivers with certainty, not based on whether the suspension would later be upheld.

The court in *R.E.J., Inc. v. City of Sikeston*, 142 S.W.3d 744 (Mo. banc 2004), when determining whether the repeal of a statute invalidated a claim made when it was in effect, compared the definition of “repeal,” which included “to rescind,” with the definition of “void”:

Black’s defines “repeal” as the “abrogation or annulling of a previously existing law,” and it means to “revoke, abolish, annul, to rescind or abrogate by authority.” Black’s Law Dictionary 1299 (6<sup>th</sup> ed. 1990). In contrast, something that is void is “[n]ull; ineffectual; nugatory; having no legal force or binding effect . . .; [a]n instrument or transaction which is wholly ineffective, inoperative, and incapable of ratification and which thus has no force or effect so that nothing can cure it.” *Id.* at 1573.

*Id.* at 745. The Court found a clear difference. If a statute is repealed (rescinded), it could still establish enforceable rights and obligations, and would be only prospectively ineffective. If a statute is void, it never created any legal rights or responsibilities. Similarly, with contracts, “[t]he rules of rescission are applicable only to voidable, and not to void, contracts. In other words, rescission contemplates a voidable but existing contract.” *Muncy v. City Of O’Fallon*, 145 S.W.3d 870, 874 (Mo.App. E.D., 2004) (internal citations omitted).

We reject Knight’s argument that the rescission rendered the revocation void *ab initio*. The primary purpose of professional licensing is to protect the public. *Garozzo v. Missouri Dept. of Ins., Financial Institutions & Professional Regis’n*, 389 S.W.3d 660, 665 (Mo. banc 2013). Section 334. 100.2(4)(g) authorizes discipline for restrictions on a doctor’s license if those restrictions were imposed for patient-care reasons. The public policy is best served if the fact that a doctor’s license or hospital privileges were restricted does not cease to exist simply because the private parties later agree to settle their dispute.

### 3. The Revocation was for Cause

Knight's staff membership and hospital privileges at the Hospital were revoked. In order to find cause for discipline, we must find not only that there was a revocation, but that the revocation is "related to unprofessional conduct, professional incompetence, malpractice, or any other violation of any provision of [chapter 334.]" Section 334.100.2(4)(g). For such "other violations," the Board alleges that the revocation was related to causes for discipline set forth in § 334.100.2(5), specifically "any conduct or practice which is or might be harmful or dangerous to the mental or physical health of a patient or the public," and repeated negligence.

We note first that "to relate" is "to show or establish a logical or causal connection." WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY, 1916 (unabr. 1986). This is clearly a low threshold. We also note that § 334.100.2(4)(g) does not require that underlying causes for discipline such as negligence, malpractice, or conduct that is or might be harmful to a patient's health be proven.

Incompetency is a general lack of professional ability, or a lack of disposition to use an otherwise sufficient professional ability, to perform in an occupation. *Tendai v. Missouri State Bd. of Reg'n for the Healing Arts*, 161 S.W.3d 358, 369 (Mo. banc 2005). "Incompetent," if used in a context relating to actual occupational ability, refers to "the actual ability of a person to perform in [the] occupation." Section 1.020(9). We also look to the analysis of incompetency in *Albanna v. State Bd. of Regis'n for the Healing Arts*, 293 S.W.3d 423, 435 (Mo. banc 2009). Incompetency is a "state of being" showing that a professional is unable or unwilling to function properly in the profession.

Repeated negligence is the failure, on more than one occasion, to use that degree of skill and learning ordinarily used under the same or similar circumstances by the member of the applicant's or licensee's profession. Section 334.100.2(5). Malpractice is the "improper

performance by a physician or surgeon of the duties devolved and incumbent upon him and the services undertaken by him . . . *whereby the patient is injured in body and health.*” *Breeden v. Hueser*, 273 S.W.3d 1, 8 (Mo. App. W.D., 2008).

Finally, unprofessional conduct has been defined to include “any conduct which by common opinion and fair judgment is determined to be unprofessional or dishonorable.” *Perez v. Missouri Bd. of Regis’n for the Healing Arts*, 803 S.W.2d 160, 164 (Mo. App., W.D. 1991). But the Missouri Supreme Court criticized that definition, calling it “circular,” and stated: “This Court interprets ‘unprofessional conduct’ in this case to refer, first, to the specifications of the matters ‘including, but not limited to’ these 17 grounds specified in as subparagraphs (a)-(q) of section 334.100.2(4).” *Albanna*, 293 S.W.3d at 431.

The June 2011 revocation of Knight’s privileges at the Hospital was related to multiple cases involving “retained foreign objects” left in patients after surgery, nine of which were “confirmed,” “various quality of care concerns,” and failure to timely inform the Hospital about a previous investigation by the Board. We have insufficient information regarding the “various quality of care concerns” to determine whether, if proven, they would relate to repeated negligence, unprofessional conduct, malpractice, incompetency, or conduct that is or might be harmful to a patient. Nor can we determine, on the record in this case, whether Knight’s alleged failure to timely inform the Hospital about the Board’s previous investigation would fall into these categories.

The fact that the revocation was related to multiple cases of retained foreign objects, however, leads us to conclude that the Hospital’s final disciplinary action was related to several of the above causes for discipline. Normally, professional negligence must be proven by expert testimony. *Tendai*, 161 S.W.3d at 368. But in a case “where a physician or surgeon has left foreign objects in operative cavities . . . proof of such fact along is generally held to establish a

prima facie case of negligence[.]” *Hart v. Steele*, 416 S.W.2d 927, 932 (Mo. 1967). We determine that the revocation of Knight’s privileges was related to his repeated negligence, and that leaving foreign objects in patients after surgery is conduct that is or might be harmful to the health of a patient. We also find that nine such incidents is evidence of professional incompetence. We do not find that the revocation was related to malpractice because there is no evidence in the record that the patients were injured in body or health. We do not find the causes for revocation were related to unprofessional conduct. *Albanna* called the application of this standard into doubt, and the Board supplied no argument to support this point.

There is cause for discipline under § 334.100.2(4)(g).

#### B. The 2014 Agreement

##### 1. The Agreement was a Final Action

In general, a settlement agreement that contains a general release disposes of the entire matter, and is a complete and final settlement of all the matters between the parties to the release. *Goldring v. Franklin Equity Leasing Co.*, 195 S.W.3d 453, (Mo. App. E.D., 2006). Knight does not dispute the finality of the Settlement Agreement, and it contains a “final and complete release.” We find the Settlement Agreement was final.

##### 2. The Agreement was a Disciplinary Action

Even if we had found that the Agreement retroactively rescinded the Revocation, the Agreement itself is a limitation or restriction on Knight’s staff membership and hospital privileges. Knight argues that it is not a final disciplinary action because no discipline was imposed. We disagree.

In *Bhuket v. State Bd. of Reg’n for the Healing Arts*, 787 S.W.2d 882 (Mo. App., W.D. 1990), the court discussed what constituted a disciplinary action, noting that statutes authorizing license discipline are enacted in the interest of the public health and welfare and should be

construed “with a view to suppression of wrongs and mischiefs undertaken to be remedied.” *Id.* at 885. It further construed the term “disciplinary action” broadly, as contemplating “any censure, reprimand, suspension, denial, revocation, restriction or other limitation placed upon the license of a person subject to Chapter 334.” *Id.*

The Board also cites two cases from other states. In *Imber v. Board of Medical Examiners of Iowa*, 2007 WL 601544 (Iowa Ct. App., Feb. 28, 2007), the Court found that a settlement agreement under which Imber surrendered his California medical license was a final disciplinary action that would support discipline in Iowa. In *Gross v. Dep’t of Fin. & Prof’l Regulation*, 960 N.E.2d 704 (Ill. App. Ct. 1<sup>st</sup> Dist 2011), the Court found that a settlement agreement under which Gross agreed to have his Colorado license placed on inactive status was a final disciplinary action that would support denying his license renewal application in Illinois. In response to the argument that the agreement was not discipline because Gross did not admit to any wrongdoing, the Court stated:

Dr. Gross’s agreement with the Colorado Board has some characteristics in common with a plea of *nolo contendere*. When a party pleads *nolo contendere* to a charge, that party does not admit that he committed charged misconduct, but he accepts some form of the consequences just as though he had committed the charged misconduct. Here, Dr. Gross did not admit wrongdoing, but he accepted, as a consequence of the charges, a restriction on his license that precluded him from actively practicing in Colorado.

*Id.* at 709 (citation omitted).

Knight attempts to distinguish these cases, but the very words of § 334.100.2(4)(g) – “whether agreed to voluntarily or not” – imply that a settlement agreement may be the foundation for “final disciplinary action.” Section 334.001.1(9) provides that certain information shall be an open record: “any final discipline by the board, including the content of the settlement agreement or order issued[.]”

Knight agreed not to renew his privileges at the Hospital, and he did not attempt to renew them. He argues that his failure to renew his privileges at the Hospital was not due to the Agreement, but was his own decision. His privileges had expired at the time of the Agreement. He presented evidence that he did not, at the time he signed the Agreement, intend to return to Des Peres. Knight's intentions are irrelevant. The language of the Agreement prohibits Knight from doing something he would have had the right to do in absence of the Agreement – seek reinstatement of his medical staff membership and privileges at a hospital.

Section 334.100.2(4)(g) includes in the definition of final disciplinary action, “restriction of the person’s license or staff or hospital privileges, failure to renew such privileges or license for cause.” The Agreement provided that Knight would not renew his membership and staff privileges at the Hospital. Knight argues that he did not actually promise not to seek privileges at the Hospital again, but this argument is specious. Although the Agreement does not contain such an explicit promise, an agreement not to seek membership and privileges there in the future is clearly part of the consideration offered by Knight to induce the Hospital to enter into the Agreement.

We find that under the Agreement, Knight waived any rights he might have had to seek membership and privileges at the Hospital in the future. This was a significant limitation on or restriction of his “staff or hospital privileges,” and a final disciplinary action under § 334.100.2(4)(g).

### 3. The Agreement’s Restriction was for Cause

The Board argues that the Agreement is related to unprofessional conduct, professional incompetence, malpractice, repeated negligence, and conduct or practice that is or might be harmful to the mental or physical health of a patient because it arises from the June 2011

revocation of privileges which was related to retained foreign objects, other quality of care concerns, and failing to inform the hospital of a state board licensing investigation.

It is true that the Agreement does not list these causes, but neither does it absolve Knight of them. It refers to the revocation and states that “the facts and circumstances surrounding the revocation are disputed by the parties[.]” The Agreement between Des Peres and Knight was entered into as a result of the revocation and, therefore, because of the underlying reasons for the revocation. We have already found that those reasons were related to repeated negligence, incompetence, and conduct or practice that is or might be harmful or dangerous to the mental or physical health of a patient.

We conclude that the Agreement constitutes a final disciplinary action related to negligence, incompetence, and conduct or practice that is or might be harmful or dangerous to the mental or physical health of a patient. It is cause to discipline Knight under § 334.100.2(4)(g).

### **Summary**

Knight is subject to discipline under § 334.100.2(4)(g).

SO ORDERED on January 30, 2015.

/s/ Karen A. Winn  
KAREN A. WINN  
Commissioner